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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB AND RUTH S. GOLDFARB,

Petitioners

V.

VIRGINIA STATE BAR AND FAIRFAX COUNTY BAR ASSOCIATION,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE NATIONAL ORGANIZATION OF BAR COUNSEL AS AMICUS CURIAE

RICHARD C. MCFARLAIN, *President,*
National Organization of Bar Counsel

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MOTION OF THE NATIONAL ORGANIZATION OF BAR COUNSEL FOR LEAVE TO FILE BRIEF AMICUS CURIAE

MOTION

Pursuant to Rule 42 of the Rules of this Court, the National Organization of Bar Counsel (NOBC), a non-profit organization, hereby respectfully moves this Court for leave to file the attached brief *amicus curiae* in the above-captioned case. The brief supports the position that the Sherman Act cannot constitutionally apply to fees of attorneys or fee schedules promulated by or for attorneys. Of course, this constitutional argument is only necessary if it is assumed, *arguendo*, that Congress intended to exercise its Commerce power under the Sherman Act over such fees or fee schedules. Because the latter questions (including the "state action" exemption question) have been adequately briefed by the parties, this brief is confined to arguments in support of the constitutional principle asserted above.

The attorney for petitioners, Alan B. Morrison, Esquire; the attorney for respondent Virginia State Bar, the Office of Attorney-General of Virginia; and the attorneys for respondent Fairfax County Bar Association, Hunton, Williams, Gay and Gibson, have consented to the filing of this brief by the NOBC.[1] The decision to submit the *amicus* brief on behalf of the NOBC was made by majority vote of the Executive Committee of the NOBC, said majority consisting of Richard C. McFarlain, President, Albert L. Bell, Vice-President, and Richard H. Senter, Immediate Past President. The remaining two members of the Executive Committee, Fred Grabowsky, Treasurer, and James R. Wrenn, Jr., Secretary, abstained from said Executive Committee vote.

The interests of the NOBC as *amicus curiae* and the issue addressed are set forth at the beginning of the attached brief.

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1. Letters from counsel have been supplied to the Clerk of this Court together with this motion and brief.

TABLE OF CONTENTS

INTERESTS OF THE NOBC AMICUS CURIAE 1

ISSUE ADDRESSED BY AMICUS CURIAE BRIEF 2

SUMMARY OF ARGUMENT 3

ARGUMENT

THE SEPARATION OF POWERS DOCTRINE AND THE TENTH AMENDMENT PROHIBIT APPLICATION OF THE SHERMAN ACT TO REGULATION OF ATTORNEYS' FEES THROUGH FEE SCHEDULES, WHETHER THEY BE "MINIMUM," "MAXIMUM," "CUSTOMARY," "ORDINARY," "USUAL," "RECOMMENDED," "REASONABLE," OR "SUGGESTED" FEE SCHEDULES 5

CONCLUSION 14

APPENDIX "A"

TABLE OF AUTHORITIES

Cases

A. B. S Small Co. v. *American Sugar Refinery Co.*, 267 U.S. 233 (1925) 12

Anderson v. *Dunn*, 6 Wheat 204, 5 L.Ed. 242 (1821) 3, 4, 5, 7

Button v. *Day*, 204 Va. 547, 132 S.E.2d 292 (1963) 7

Cantor v. *Supreme Court of Pennsylvania*, 487 F.2d 1394 (1973), 353 F.S. 1307 (1973) 4, 7

Connolly v. *General Construction Co.*, 269 U.S. 385 (1926) 12

Ex Parte Garland, 71 U.S. 333 (1866) 7

Ex Parte Secombe, 19 Howard 9, 15 L.Ed. 565 (1856) 3, 6

Ex Parte Wall, 107 U.S. 265 (1882) 6

Grouppi v. *Leslie*, 404 U.S. 469, 92 S.Ct. 582, 30 L.Ed. 2d 632 (1972) 5

In re Bailey, 30 Ariz. 407, 248 P. 29 (1926) 7

In re Barclay, 82 Utah 288, 24 P.2d 302 (1933) 7

In re Bogarth, 178 Okl. 427, 63 P.2d 726 (1936) 7

In re Chapman, 166 U.S. 661, 17 S.Ct. 677 (1897) 3, 5

In re Olson, 116 Wash. 186, 198 P. 742 (1921) 7

In re Opinion of the Justices, 279 Mass. 602, 180 N.E. 725 (1932) 7

In re Platz, 42 Utah 439, 132 P. 390 (1913) 7

In the matter of Reed, 396 U.S. 274, 90 S.Ct. 562 (1970), 257 A.2d 382 (1970) 6

Jurney v. *McCracken*, 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802 (1935) 3, 5

Kilbourn v. *Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881) 3, 5

Lathrop v. *Donahue*, 367 U.S. 820, 81 S.Ct. 1826 (1961) 3, 6

Marshall v. *Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881 (1917) 3, 5

Nicholson v. *Shockey*, 192 Va. 270, 64 S.E.2d 813 (1951) 4, 8

People v. *Peoples' Stock Yard State Bank*, 343 Ill. 462, 176 N.E. 901 (1931) 7

Powell v. *Alabama*, 287 U.S. 45 (1932) 3, 6

Rhode Island Bar Ass'n v. *Automobile Service Ass'n*, 55 R.I. 122, 179 A. 139 (1935) 7

Ruckenbrod v. *Mullins*, 102 Utah 548, 133 P.2d 325 (1943) 7

Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957) 6

Stanton v. *Embry*, 93 U.S. 548 (1876) 4, 12, 13

State Bar Ass'n v. *Connecticut Bank & Trust Co.*, 145 Conn. Supp. 222, 140 A. 2d 863 (1958) 7

Stiers v. *Hall*, 170 Va. 569, 197 S.E. 450 (1938) 4, 8

Theard v. *United States*, 354 U.S. 278, 77 S.Ct. 1274 (1957) 3, 6

United States v. *Equitable Trust Co. of New York*, 283 U.S. 738, 51 S.Ct. 639 (1931) 4, 8, 13

United States v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921) 12

Williams v. *Bruffey*, 96 U.S. 176, 24 L.Ed. 716 (1877) 6

Constitutions, Statutes and Rules of Court

United States Constitution
Tenth Amendment 3

Sherman Act, Section 1, 26 Stat. 209, as amended, 15 U.S.C. 1 ..... 3, 4, 14

28 U.S.C. §1257(2) 6

Rules of the Supreme Court of Virginia, Part Six, 171 Va. xvii, *et seq.*, 211 Va. 295, *et seq.* 4, 8-13

Miscellaneous

Hokwood, "The Supreme Court's Power over Admission and Disbarment: Inherent or Statutory?" 25 Baylor Law Rev. 368 (1973) 7

Report of the ABA "Special Committee on Evaluation of Disciplinary Enforcement," Section II, (1970) 7

Virginia State Bar Legal Ethics Opinion No. 98 (1960) 13

Virginia State Bar Legal Ethics Opinion No. 170 (1971) 13

Virginia State Bar "Minimum Fee Schedule Report" (1969) 13

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BRIEF FOR THE NATIONAL ORGANIZATION OF BAR COUNSEL AS AMICUS CURIAE

THE INTEREST OF THE AMICUS CURIAE

The National Organization of Bar Counsel (NOBC) is a non-profit, professional association of counsel to bar disciplinary organizations in thirty states. The one-hundred-nine-member NOBC is funded by annual dues paid by each disciplinary organization represented therein.

The NOBC was founded in February, 1965 during the American Bar Association (ABA) winter meeting. Although the NOBC is affiliated with the ABA and meets semi-annually in conjunction with the ABA, the NOBC is not a part of the ABA, nor is it subject to the authority or policies of the ABA.

The purpose of the NOBC is to serve as a vehicle for improving and maintaining the effectiveness of the discipline of the legal profession throughout the country. Most recently, the NOBC "Special Committee on Watergate" furnished valuable and effective assistance to disciplinary counsel in the respective states by arranging and coordinating the dissemination of information from the Senate "Watergate Committee" and the Watergate Special Prosecutor regarding the involvement of attorneys in improper conduct.

Two of the NOBC's charter members, John G. Bonomi (a former President of the NOBC) and Fred B. Hulse, served on the ABA "Special Committee on Evaluation of Disciplinary Enforcement" (popularly known as the "Clark Committee"), chaired by the Honorable Tom C. Clark, former Associate Justice of this Court.

As a national, professional organization of bar disciplinary counsel from thirty states, the NOBC has a unique interest in the proper resolution of the paramount issue herein. Furthermore, because of its specialized function, the NOBC is uniquely qualified to assist the Court in focusing objectively on that issue.

THE ISSUE TO WHICH THIS BRIEF IS ADDRESSED

The argument in this brief is predicated upon an assumption, *arguendo*, that the legal fees and/or fee schedules

in question have substantial impact on interstate commerce and that Congress intended the Sherman Act to apply to such fees and/or fee schedules. Because resolution of the issues in this case on the basis of the argument advanced in this brief would preclude a finding that the Sherman Act is applicable, this brief does not address either the "state action" exemption or the "learned profession" exemption.

The paramount issue in this case is whether regulation of particular professional conduct of attorneys is a constitutionally permissible scope of activity by Congress, when such professional conduct is inextricably subject to regulation by the judiciary. This brief argues that the Separation of Powers doctrine and the Tenth Amendment preclude subjugation of such conduct to regulation under the Sherman Act.

SUMMARY OF ARGUMENT

The Separation of Powers doctrine and the Tenth Amendment to the United States Constitution prohibit Congress from exercising judicial power not conferred on it by the Constitution. *Jurney* v. *MacCracken*, 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802 (1935); *Marshall* v. *Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881 (1917); *In re Chapman*, 166 U.S. 661, 17 S.Ct. 677 (1897); *Kilbourn* v. *Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881); *Anderson* v. *Dunn*, 6 Wheat 205, 5 L.Ed. 242 (1821). Regulation of conduct—in court or out of court—relating to one's competence and/or fitness to practice law is an "exclusively judicial function" exercised through inherent judicial power. *Lathrop* v. *Donahue*, 367 U.S. 820, 81 S.Ct. 1826 (1961); *Theard* v. *United States*, 354 U.S. 278, 77 S.Ct. 1274 (1957); *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Ex Parte Secombe*, 19

Howard 9, 15 L.Ed. 565 (1856); *Cantor* v. *Supreme Court of Pennsylvania*, 487 F.2d 1394 affirming *per curiam* the decision of the District Court for the Eastern District of Pennsylvania reported at 353 F.S. 1307 (1973); [State supreme court decisions omitted here—see footnote 4, *infra*.].

The amount of a particular fee set by an attorney for his services is subject to the authority and special scrutiny of the judiciary, and the factors to be used in setting such fee—as determining the "reasonableness" thereof—are prescribed by the judiciary. *United States* v. *Equitable Trust Co. of New York*, 283 U.S. 738, 51 S.Ct. 639 (1931); *Nicholson* v. *Shockey*, 192 Va. 270, 64 S.E.2d 813 (1951); *Stiers* v. *Hall*, 170 Va. 569, 197 S.E. 450 (1938); *Rules of the Supreme Court of Virginia, Part Six, Section II, Canons 12 & 13* [171 Va. xxii, xxiii (1938)] *superseded* by *Section II, Ethical Considerations 2-16 through 2-20, 2-24 & 2-25* and *Disciplinary Rules 2-106 and 2-110(A)(3)* [211 Va. 295 at 301-304, 313-315 (1971)].

This Court has recognized evidence of the legal fees "ordinarily" or "usually" charged by local attorneys as a proper measure for establishing the reasonableness of a fee charged by a particular attorney. *Stanton* v. *Embrey*, 93 U.S. 548 (1876).

Because attorney's fees are demonstrably and inextricably subject to judicial control, then *a fortiori* under the principle applied in *Anderson*, 6 Wheat 205, *supra*, and subsequent cases Congress is without power to subject such fees or schedules for such fees to regulation under the Sherman Act.

ARGUMENT

The Separation of Powers Doctrine and the Tenth Amendment prohibit Application of the Sherman Act to the Regulation of Attorneys' Fees Through Fee Schedules, Whether They be "Minimum," "Maximum," "Customary," "Ordinary," "Usual," "Recommended," "Reasonable," or "Suggested" Fee Schedules.

The constitutional principle prohibiting the exercise of judicial power by Congress has been applied by this Court in numerous cases. *Jurney* v. *MacCracken*, 294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802 (1935); *Marshall* v. *Gordon*, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881 (1917); *In re Chapman*, 166 U.S. 661, 17 S.Ct. 677 (1897); *Kilbourn* v. *Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881); *Anderson* v. *Dunn*, 6 Wheat 205, 5 L.Ed. 242 (1821). The common principle applied in those cases is that Congress cannot constitutionally exercise any judicial power not expressly conferred upon it by the Constitution or *necessarily implied* to enable Congress to *function as a legislative body*. The only such implied judicial power recognized by this Court in the aforesaid cases is the power to summarily punish non-members of Congress for contemptuous conduct which threatens the legislative functioning of Congress. *Jurney*, 294 U.S. at 143-144; *Marshall*, 243 U.S. at 542-546; *Chapman*, 166 U.S. at 667-669; *Kilbourn*, 103 U.S. at 192-193, 197, 200; *Anderson*, 6 Wheat at 230-231. Furthermore, the exercise of such implied power is constitutionally limited to ". . . the least possible power adequate to the end proposed." *Anderson*, 6 Wheat at 231. This latter limitation was recently followed by this Court in applying the *Anderson* test to the exercise of summary contempt power by the Wisconsin Legislature in *Groppi* v. *Leslie*, 404 U.S. 469 at 507, 92 S.Ct. 582 at 588, 30 L.Ed.2d 632 (1972), wherein the state legislature had summarily confined Groppi for

contempt without notice and two days after the alleged contemptuous conduct.

It is well-settled by the overwhelming weight of authority that regulating the professional conduct of attorneys is an "exclusively judicial function" as stated by this Court in *Ex Parte Secombe*, 19 Howard at 13. [See footnote No. 4, *infra*, for additional authorities.] Although rules of a state supreme court integrating the bar have been considered "legislative in nature" and "state action" for purposes of review by this court under 28 U.S.C. §1257(2)[2], *Lathrop* v. *Donahue*, 367 U.S. at 824, the *power* exercised thereby is *judicial* in nature[3]. *Lathrop*, at 826. The overwhelming weight of authorities established beyond serious doubt that such power is judicial in nature[4].

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2. In *Lathrop*, the Court found controlling its prior construction of a similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, that "Any enactment from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this Court. *Williams* v. *Bruffy*, 96 U.S. 176, 183, 23 L.Ed. 716 (1877).

3. Just as Congress has implied power, in its grant of legislative power, to engage in certain actions which are judicial in nature in order to exercise its legislative power [*Jurney*, 294 U.S. at 143-144; *Marshall*, 243 U.S. 521; Chapman, 166 U.S. at 667-669; *Kilbourn*, 103 U.S. at 192-193, 197, 200; *Anderson*, 6 Wheat at 230-231], the judiciary necessarily has implied power, in its grant of judicial power, to engage in certain actions which are "legislative in nature" in order to exercise its judicial power.

4. *In the matter of Reed*, 396 U.S. 274, 90 S.Ct. 562 (1970), affirming *per curiam* an appeal from a decision by the Delaware Supreme Court upholding its inherent power to require by rule of court contributions by Delaware attorneys to a client security fund as a requisite to maintaining their licenses to practice law, 257 A.2d 382 (1970); *Lathrop* v. *Donahue*, 367 U.S. at 843, 81 S.Ct. at 1838; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 at 248 (1957); *Theard* v. *United States*, 354 U.S. 278 at 282, 77 S.Ct. 1274 at 1276 (1957); *Powell* v. *Alabama*, 287 U.S. 45 at 73 (1932); *Ex Parte Wall*, 107 U.S. 265 at 273

Because the regulation of the professional conduct of attorneys is a function performed through the exercise of judicial power, it is clear that proper application of the *Anderson* principle, *supra*, precludes subjugation of the *professional conduct* of attorneys (i.e., conduct inextricably subject to judicial control) to regulation by Congressional legislation not in strict conformity with asserted judicial regulatory schema over the same conduct. To resolve the issue in the instant case without negating the aforesaid *Anderson* principle, it is necessary that the inquiry proceed initially upon the question of whether regulation of the particular conduct in question is a judicial function and/or an exercise of judicial power. If it is, then Congressional legislation not in strict conformity with, or in consonant support of, the exercise of such function and power can not constitutionally apply thereto. To inquire initially

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4. (continued)

(1882); *Ex Parte Garland*, 71 U.S. 333 at 378-379 (1866); *Ex Parte Secombe*, 19 Howard at 13; *Cantor* v. *Supreme Court of Pennsylvania*, 487 F.2d 1394 (1973) affirming without opinion the decision of the District Court for the Eastern District of Pennsylvania upholding the power of the Pennsylvania Supreme Court to integrate the bar by rule of court, 353 F.S. 1307 (1973); *Button* v. *Day*, 204 Va. 547 at 554 (1963); *State Bar Ass'n* v. *Conn. Bank & Trust Co.*, 145 Conn. Supp. 222, 140 A.2d 863 (1958); *Ruckenbrod* v. *Mullins*, 102 Utah 548, 133 P.2d 325 at 330 (1943); *Rhode Island Bar Ass'n* v. *Automobile Service Ass'n*, 55 R.I. 122, 179 A. 139 (1935); *In re Opinion of the Justices*, 279 Mass. 607; 180 N.E. 725, 727-728 (1932); *People* v. *Peoples' Stock Yard State Bank*, 344 Ill. 462, 176 N.E. 901 at 905 (1931); *In re Bozarth*, 178 Okl. 427, 63 P.2d 726 at 728 (1936), citing cases from twenty-five jurisdictions in which inherent judicial power to regulate the practice of law was recognized; *In re Barclay*, 82 Utah 288, 24 P.2d 302 at 303 (1926); *In re Bailey*, 30 Ariz. 407, 248 P. 29 at 30-32 (1926); *In re Olson*, 116 Wash. 186, 198 P. 742 at 743-744 (1921); *In re Platz*, 42 Utah, 132 P. 390 at 392 (1913); Terry Hogwood, "The Supreme Court's Power over Admission and Disbarment: Inherent or Statutory?" 25 Baylor Law Rev. 368, *et seq.* (1973); "Clark Committee" Report, Section II (1970).

whether regulation of such conduct is legislative in nature would be to disregard the overwhelming weight of authority by which regulation of such conduct is clearly presumed to be judicial in nature and to ignore the aforesaid decisions of this Court to the contrary *supra*.

Specifically, setting legal fees is inextricably subject to the regulatory scheme and inherent power of the judiciary. Courts have always had the inherent power to apply special criteria in passing upon the reasonableness of a legal fee, which criteria are substantially different from the criteria ordinarily applied in determining the enforceability of other fees for services. *Nicholson v. Shockey*, 192 Va. 270, 64 S.E.2d 813 (1951); *Stiers v. Hall*, 170 Va. 569 at 579, 197 S.E. 450 (1938). Indeed, this Court has exercised such power by reducing a legal fee from $100,000 to $50,000 in *United States* v. *Equitable Trust Co. of New York*, 283 U.S. 738, 51 S.Ct. 639 (1931).

The parameters universally established by the courts for setting and enforcing legal fees proscribe (1) the *habitual*[5] charging of legal fees so unreasonably low that the furnishing of competent legal services is rendered improbable as a direct result thereof and (2) the charging of *any* fee which

5. The standard imposed by the Virginia Supreme Court regarding unrealistically low fees can only be deemed to prohibit the charging of such fees with such frequency that rendition of competent legal services would be improbable, because the same standard also imposes a duty on attorneys to charge no fee when necessitated by the economic status of the client. Disciplinary Rule 6-101(A)(2) prohibits an attorney from handling a legal matter "without preparation adequate in the circumstances," and the habitual charging of unreasonably low fees would increase the probability of violation of DR 6-101(A)(2). On the other hand, Ethical Consideration 2-25 provides that, ". . . The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of the lawyer."

is excessive[6]. Consequently, because of the subjugation of attorneys' fees to such judicial control, and because attorneys are ethically and legally required to charge "reasonable" fees, their failure to do so not only could prevent them from collecting such fees, but also could serve as a basis for discipline[7].

That regulation of such fees in the instant case is subject to judicial control is established beyond dispute by the Rules of the Supreme Court of Virginia as originally promulgated and subsequently amended. Originally, *Section II* of the *Rules of the Supreme Court of Virginia, Part Six*, provided *inter alia*, as follows:

> Canon 12. Fixing the Amount of the Fee.—In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. . . .
>
> In determining the amount of the fee, it is proper to consider: . . . (3) the customary charges of the Bar for similar services. . . .
>
> In determining the customary charges of the Bar for similar services, it is proper for a lawyer

6. While a lawyer may properly charge an unrealistically low fee (or even no fee), he may *never* properly charge an excessive fee. See Disciplinary Rule 2-106(A) in Appendix "A".

7. The *habitual* charging of unrealistically low fees would, in most cases, create a substantial probability that the attorney would violate Disciplinary Rule 6-101(A)(2), which prohibits an attorney from handling a legal matter "without preparation adequate in the circumstances." [See Appendix "A".] On the other hand, the charging of even *one* "excessive" fee could serve as a basis for disciplinary action under Disciplinary Rule 2-106(A). [See Appendix "A".]

to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee. . . .

171 Va. xxii, xxiii (1938) [Other provisions of Canon 12 and Canon 13 are set forth in Appendix "A" attached hereto.]

Subsequently the Court promulgated the *Virginia Code of Professional Responsibility* as *Section II* in lieu of the original *Section II*. The new *Section II* provides, *inter alia*, as follows:

Ethical Considerations:

2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

2-17 . . . A lawyer should not charge more than a reasonable fee. . . . Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

2-18 The determination of the reasonableness of a fee requires consideration of all relevant

circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state *and local bar associations* provide some guidance on the subject of reasonable fees. . . .

2-25 . . . The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer. . . . Every lawyer should support all proper efforts to meet this need for legal services.

Disciplinary Rules
2-106 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of fee include the following:

* * * *

(3) The fee customarily charged in the locality for similar legal services.

* * * *

211 Va. 313 (1971) (emphasis added) [Other provisions of the foregoing are set forth in Appendix "A" attached hereto.]

The foregoing provisions of the code of conduct imposed by the Virginia Supreme Court upon its attorneys clearly establish "suggested fee schedules . . . of state and local bar associations" and fees "customarily charged in the locality for similar legal services," *inter alia*, as criteria on which an attorney may rely in attempting to set a "reasonable" fee. Furthermore, in view of the potential for disciplinary acion resulting from the *habitual* charging of unreasonably low fees [See footnote No. 5, *supra*.] or from *any charging* of an "excessive fee" [Disciplinary Rule 2-106(A), *supra*], there would be substantial doubt as to the enforceability of the duty to charge "reasonable" fees were it not for the aforecited criteria, *inter alia*, promulgated by the Court.[8]

In addition to the foregoing authorities supporting reliance on "suggested" or "customary" fee schedules, this Court has upheld in a proceeding to determine the reasonableness of a particular legal fee the admissibility of evidence of local legal fees "ordinarily charged" or "usually charged". *Stanton* v. *Embrey*, 93 U.S. 548 at 577 (1876).

In the instant case, "minimum fee schedules," "suggested fee schedules . . . of state and local bar associations," and "customary" fees have been specifically established by Rules of the Supreme Court of Virginia, as originally promulgated and amended, as criteria, *inter alia*, on which an attorney should rely in setting his legal fees. To reject such substantive guidance as not reasonably related to the judicial function of regulating the conduct of attorneys would be to reject the overwhelming weight of authority in this country and to

8. In absence of such criteria, the prohibition against charging an "excessive" fee might be deemed void for vagueness. See *Connolly* v. *General Construction Co.*, 296 U.S. 385 (1926); *A. B. Small Co.* v. *American Sugar Refinery Co.*, 267 U.S. 233 (1925); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

clearly contradict the principle this Court applied in *United States* v. *Equitable Trust*, *supra*, and *Stanton* v. *Embrey*, *supra*.

Respondent Virginia State Bar was created by Rule of the Supreme Court of Virginia in 1938. *Rules of the Supreme Court of Virginia, Part Six*, 171 Va. xvii, *et seq.* (1938). In creating the Virginia State Bar, the Court delegated to its governing body, the Council, general power to administer and enforce the Rules of the Court governing the practice of law and discipline of attorneys in Virginia. *Rules, Part Six, Section IV*, ¶9. Included in said *Rules* were the *Canons of Professional Ethics*, originally promulgated as *Section II* thereof, *supra*, (now replaced by the *Virginia Code of Professional Responsibility*, as *Section II* thereof, *supra*.) In addition, the Court delegated to the Council the power to render "advisory opinions" to active members regarding the propriety, under the *Canons* or the *Code*, of their "contemplated professional conduct." *Rules, Part Six, Section IV*. ¶¶9(i) and 10. Pursuant to the authority conferred under said ¶¶ 9 and 10 the Council promulgated Legal Ethics Opinion No. 98 [construing provisions of the *Canons* then controlling legal fees] in 1960[9] and Legal Ethics Opinion No. 170 [construing provisions of the *Code* controlling legal fees] in 1971[10]. Additionally, pursuant to the powers conferred in said ¶9 and in furtherance of its responsibility under ¶10, the Council promulgated a Report of local minimum fee schedules in 1969[11]. The aforesaid actions of the Council were clearly authorized, if not mandated, by ¶¶ 9 and 10 in view of the provisions of the *Canons* and the *Code* regarding legal fees.

9. See Stipulations, ¶ 20 App. p. 19.
10. See Stipulations, ¶ 20 App. p. 19.
11. Exhibit 27, p. 3, A 25.

In the final analysis the question is *not* whether the actions of the Virginia State Bar were [are] "state action." Rather, the question is whether the actions of the Supreme Court of Virginia and the Virginia State Bar, exercising powers delegated to it by the Court, constitute judicial functions and/or the exercise of judicial power. According to the overwhelming weight of authorities set forth above, an attempt by Congress to legislatively regulate the conduct in question through the Sherman Act, would be an unconstitutional exercise of judicial power. Consequently, it is unnecessary for the same reason to consider whether respondent Fairfax County Bar Association may be exempt from the Sherman Act under a "learned profession" theory.

Finally, the uniqueness of the principle precluding applicability of the Sherman Act to the instant case manifestly provides a proper constitutional deference to the judiciary without diminishing the intended breadth of the Sherman Act to regulate other professions in order to prevent the abuses it was designed to eliminate.

CONCLUSION

For the foregoing reasons this Court should affirm the result obtained in the Court of Appeals below but should predicate said result on the constitutional principle outlined above.

Respectfully submitted,

RICHARD C. MCFARLAIN, *President,*
National Organization of Bar Counsel

12. **Fixing the Amount of the Fee.**—In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. **Contingent Fees.**—Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges.

171 Va. xxii, xxiii (1938)

Financial Ability to Employ Counsel: Generally

EC 2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to

obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Financial Ability to Employ Counsel: Persons Able to Pay Reasonable Fees

EC 2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC 2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees

EC 2-24 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC 2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every

lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

DR 2-110 Withdrawal from Employment.

(A) In general.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not

been earned.

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(2) Handle a legal matter without preparation adequate in the circumstances.

211 Va. 295 at 301-304, 313-315 (1971)